

NO. 05-20-00351-CV

**IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
DALLAS, TEXAS**

**TARRANT COUNTY COLLEGE DISTRICT,
APPELLANT**

VS.

**AMANDA SIMS,
APPELLEE**

**Appeal from the 116th District Court of Dallas County, Texas
The Honorable Tonya Parker, Presiding
Case No. DC-19-18217-CV**

BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS CAMPAIGN

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IDENTITY AND INTERESTS OF AMICUS CURIAE

The Human Rights Campaign (“HRC”) is a non-profit civil rights organization with more than three million members dedicated to ending discrimination against lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and realizing a world that achieves fundamental fairness and equality for all. HRC envisions a world where LGBTQ people are ensured equality and embraced as full members of society at home, at work, and in every community. Among other things, HRC advocates for policies, regulatory changes and legislation that guarantee the legal equality of LGBTQ people.

HRC is paying all fees associated with preparing this brief.

SUMMARY OF ARGUMENT

This Court should follow the recent holding of the Supreme Court of the United States recently in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), to hold that Texas Commission on Human Rights Act (“TCHRA”) prohibits employment discrimination on the basis of sexual orientation or gender identity. Texas law is clear that the Supreme Court of the United States’ interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”) apply to analogous provisions of the TCHRA. Here, the language at issue under the TCHRA is substantively identical to that of Title VII and applying *Bostock* is consistent with the mandate of the Supreme Court of Texas. Additionally, applying the holding in *Bostock* is consistent with the plain language of the TCHRA, as well as the policy goals and objectives the Texas Legislature sought to achieve when it enacted the TCHRA. *Bostock*’s holding also is consistent with

the remedial purpose of the TCHRA and Supreme Court of Texas opinions that construe the TCHRA. Finally, the remedial nature of the TCHRA dictates a finding that it prohibits discrimination based on sexual orientation or gender identity in light of pernicious consequences resulting from such discrimination. This is especially true when, as here, a government institution seeks license to discriminate on the basis of sexual orientation.

STANDARD

Issues of statutory construction are reviewed *de novo*. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (citing *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)). Texas courts’ “objective in construing a statute is to give effect to the Legislature’s intent, which requires [the court] to first look to the statute’s plain language.” *Id.* (citing *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008)). If the statute’s language is unambiguous, Texas courts “interpret the statute according to its plain meaning.” *Id.* Texas courts’ practice when construing a statute is to recognize that “the words [the Legislature] chooses should be the surest guide to legislative intent.” *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). When those words are ambiguous, however, Texas courts may “resort to rules of construction or extrinsic aids.” *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007). Moreover, a statute “shall be liberally construed to achieve [its] purpose and promote justice.” Tex. Gov’t Code § 312.006.

ARGUMENT

Against this backdrop of statutory construction, this Court should follow the Supreme Court’s clear holding in *Bostock* prohibiting discrimination based on sexual orientation or gender identity as sex discrimination for numerous compelling reasons: (1) the TCHRA’s plain language is substantively identical to Title VII’s language at issue in *Bostock* and the TCHRA’s aims are functionally similar to those of Title VII; (2) Texas courts read the TCHRA in harmony with federal interpretations of Title VII as in *Bostock*; (3) Texas courts apply similar methods of statutory interpretation as employed in *Bostock*; (4) the intent of the Texas legislature in adopting the TCHRA compels a finding consistent with *Bostock*’s holding; and (5) adopting *Bostock*’s holding will combat the many pernicious effects and financial consequences to the Texas economy and taxpayers resulting from discrimination based on sexual orientation and gender identity, especially when, as here, a government institution seeks license to discriminate on the basis of sexual orientation.

I. The TCHRA—Like Title VII—Prohibits Discrimination Because of “Sex”, Which Includes Sexual Orientation and Gender-Identity Discrimination.

A. Texas law requires courts to construe the TCHRA in harmony with Title VII.

First, Texas law requires courts to construe the TCHRA in harmony with Title VII and, thus, the Court should do so here in determining the meaning of “sex” under the TCHRA. The Texas Legislature enacted the TCHRA “to address the specific evil of discrimination and retaliation in the workplace.” *City of Waco v. Lopez*, 259 S.W.3d 147,

153 (Tex. 2008). The TCHRA expressly states that it was adopted to “provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.” Tex. Lab. Code § 21.001.

Indeed, a myriad of Supreme Court of Texas opinions direct lower courts to implement the will of the legislature and construe the TCHRA in a manner consistent with federal decisions that interpret Title VII. As the Supreme Court of Texas explained in one opinion, the TCHRA’s language “purports to correlate ‘state law with federal law in the area of discrimination in employment.’” *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999). The Supreme Court of Texas has “consistently held that those analogous federal statutes and the cases interpreting them guide our reading of the TCHRA.” *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012). The court does so because “[t]he relevant parts of the TCHRA are patterned after Title VII of the federal Civil Rights Act. Thus, we would ordinarily look to federal precedents for interpretive guidance to meet the legislative mandate that the TCHRA is intended to ‘provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.’” *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001) (quoting Tex. Lab. Code § 21.001(1)).

The *Quantum* court also noted that TCHRA Section 21.051 is not only analogous to federal law, but actually “substantively identical to its federal law equivalent in Title VII, with the exception that the federal law does not protect age and disability.” *Id.* at 475. More recently, the Supreme Court of Texas unambiguously emphasized as much:

“In discrimination and retaliation cases under the TCHRA, Texas jurisprudence parallels federal cases construing and applying equivalent federal statutes, like Title VII.” *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 781 (Tex. 2018).

Thus, based on the express language in the TCHRA and the clear line of cases from the Supreme Court of Texas, this Court should follow and apply Title VII precedent from the Supreme Court of the United States to the substantively identical language under the TCHRA, including the Court’s recent holding in *Bostock*. 140 S. Ct. 1731.

B. *Bostock* confirms sexual orientation discrimination is “sex” discrimination under the plain text of Title VII and thus is also discrimination on the basis of “sex” under the TCHRA.

Consistent with this directive from the Supreme Court of Texas, this Court should follow the decision of the Supreme Court of the United States in *Bostock*, which held that sexual orientation and gender-identity discrimination is “sex” discrimination under Title VII. 140 S. Ct. 1731 (2020). Moreover, the straightforward analysis of the Supreme Court of the United States tracks the analysis that Texas courts apply when interpreting statutes.

In *Bostock*, the Supreme Court of the United States considered whether firing someone merely for being gay or transgender constitutes actionable “sex” discrimination prohibited by Title VII. Writing for the Court, Justice Gorsuch noted that “[i]n Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an

individual merely for being gay or transgender defies the law.” *Bostock*, 140 S. Ct. at 1754. Indeed, because “homosexuality and transgender status are inextricably bound up with sex,” “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹ *Id.* at 1741-1742. The Court further noted that “[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and the extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefits.”² *Id.* at 1737.

¹ Further underscoring the textual connection of the two laws, Title VII and the TCHRA both prohibit discrimination “because of” sex. Because the “because of” language of Title VII and the TCHRA are substantively identical, both federal and Texas state courts require a plaintiff only to demonstrate that unlawful discrimination was a “motivating factor” in an adverse employment action as opposed to under a theory of retaliation, which requires heightened proof that a protected trait—like sex—was a but-for cause of the challenged employment decision. *See, e.g., Univ. of Tex. Sw. Med. Ct. v. Nassar*, 570 U.S. 338, 349 (2013); *see also Quantum*, 47 S.W.3d at 480 (Supreme Court of Texas assigning reversible error when trial judge used words “because of” in jury instruction but failed to respond to jury inquiry on whether “because of” required discriminatory animus be sole determining factor). For this reason, it is noteworthy that *Bostock* held sexual orientation and gender-identity discrimination are discrimination because of sex under the more demanding “but-for” test. *Id.* at 1739-740.

² Indeed, this principle is underscored in Justice Kennedy’s majority opinion in *Obergefell v. Hodges*, focusing on the words and promises within the Bill of Rights and the Fourteenth Amendment in reviewing same-sex marriage. 576 U.S. 644 (2015). In *Obergefell*, the Supreme Court of the United States explained that, “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” *Id.* at 671. Instead, in order to give effect to the intent of the drafters, word choices must be honored, even if the application of those words leads to unexpected results. This approach, Justice Kennedy explained, is consistent with giving appropriate deference to the words of the law because, “[t]he nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all

And in the context of Title VII, *Bostock* determined that “Title VII’s prohibition of sex discrimination is a major piece of federal civil rights legislation. It is written in starkly broad terms.” *Bostock*, 140 S. Ct. at 1753. Indeed, the Court invoked its late colleague to note that “unexpected applications of broad language reflect only Congress’s ‘presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.’”³ *Id.* at 1755 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012)). In other words, the Supreme Court of the United States recognized that legislative acts like Title VII—and thus the TCHRA—intentionally use broad language and—in order to honor the constitutional role of the legislative branch—courts are required to construe broad legislative language broadly. This is true regardless of whether the legislature anticipated all of the applications of the broad words adopted into law, because the text is the law and extratextual expectations are not law.⁴

In applying this framework in *Bostock*, Justice Gorsuch held that the plain meaning of the words in Title VII prohibit employment discrimination based on sexual orientation or gender identity. Specifically, the Court carefully emphasized the text in Title VII that

of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” *Id.* at 664.

³ This approach is consistent with that of the Supreme Court of Texas, which held that because the TCHRA is remedial and humanitarian in nature, it should be liberally construed with any ambiguity resolved in favor of the complainant. *NME Hosps.*, 994 S.W.2d at 146.

⁴ Moreover, this maxim of statutory interpretation that “the text is the law, and it is the text that must be observed,” is shared by the Supreme Court of Texas. *Alamo Heights*, 544 S.W.3d at 763.

makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex or national origin.” *Id.* at 1738. *Bostock* focused on the words “because of” and noted that these words are not as limiting as other legislative phrases often deployed, such as “solely” because of or “primarily because of.” *Id.* at 1739. The careful parsing of the statute led the Court in *Bostock* to its necessary conclusion: “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741. *Bostock* thus held that sexual orientation and gender identity are protected traits under Title VII, just like any other protected trait.

Justice Gorsuch even assumed, for the sake of argument, the reference to “sex” in Title VII was “only to biological distinctions between male and female.” *Id.* at 1739. Even under this narrow definition of sex, however, “[t]he question isn’t just what ‘sex’ meant, but what Title VII says about it.” *Id.* This matters, because “[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.” *Id.* (emphasis in original). In addition, “an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.” *Id.* at 1740. Accordingly, the

Court held that “homosexuality and transgender status are inextricably bound up with sex” and, as a result, even under a narrow definition of sex, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741-1742. The Court further explained that “[w]hen an employer fires an employee because she is homosexual or transgender, two causal factors may be in play – *both* the individual’s sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn’t care. If an employer would not have discharged an employee but for that individual’s sex, the statute’s causation standard is met, and liability may attach.” *Id.* at 1742 (emphasis in original).

Like the *Bostock* court, this Court should hold that the TCHRA prohibits employment discrimination on the basis of sexual orientation or gender identity because doing so vindicates the text and purpose of the TCHRA in providing for the execution of the policies of Title VII. And *Bostock*’s interpretive approach and analysis are consistent with those of Texas courts.

II. The Legislative History Supports Interpreting the TCHRA Consistent with Title VII and *Bostock*.

While the textual analysis outlined above alone dictates that this Court should follow *Bostock*’s lead in interpreting the TCHRA here, it also should do so for the separate reason that the legislative history further supports such a holding. The legislative history is clear that aligning the TCHRA with Title VII is critical to the

fulfillment of fundamental policy objectives that motivated the adoption of the TCHRA. As discussed above, the legislature included express indicated in the TCHRA its intent that courts interpret the TCHRA consistent with Title VII. The legislative history explains *why* the legislature would choose to adopt a civil rights statute that provides parallel relief under state law to the relief already available to Texas residents under federal law.

At the time of adoption of the TCHRA in 1983, the Legislature noted that the statute would represent a legislative commitment to equal employment opportunity in Texas and “emphasize that state and local governments can take care of their own problems[, and t]he state of Texas and local governments should not abdicate to the federal government the obligation to investigate job-discrimination complaints.” Bill Analysis for H.B. 14, 68th Tex. Legis. (June 25, 1983). If the Texas courts do not follow *Bostock*, a substantial gap will exist between the coverage offered under state and federal law and thus undermine the goal of establishing and ensuring equal employment adjudication at the local level. This would represent an abdication of state authority, undermining the intent of the Texas legislature, as expressed both in words of the statute and in its legislative history. *Id.*; Tex. Lab. Code § 21.001.

In addition to an assertion of state authority, the Texas legislature believed that the TCHRA would enhance regulatory and economic efficiencies because “equal employment actions can be concluded faster and cheaper on the local rather than the federal level.” Bill Analysis for H.B. 14, 68th Tex. Legis. (June 25, 1983). Thus,

adoption of the TCHRA “would allow local control without bureaucracy and would cut red tape,” which would in turn result in Texas employers being “far better off, if only from an economic standpoint, by having local and state equal employment commissions deal with complaints.” *Id.* Texas courts that do not follow *Bostock* will create two different equal employment frameworks, and will undermine the Texas legislature’s policy objectives of achieving regulatory and economic efficiencies through assertion of local and state control in equal employment matters. A court should not second guess the policy objectives of a legislature and overturn by judicial fiat the clear will of the Texas legislature to conform the TCHRA to Title VII. The plain language and Legislative history thus compel a finding that sexual orientation and gender-identity discrimination are discrimination on the basis of “sex” under the TCHRA.

III. The TCHRA’s Remedial Nature Dictates a Determination that It Prohibits Discrimination Based on Sexual Orientation or Gender Identity in Light of the Evil and Pernicious Results Associated with Such Discrimination.

Finally, the remedial nature of the TCHRA likewise dictates holding that it prohibits discrimination on the basis of sexual orientation or gender identity. As discussed above, the TCHRA is remedial in nature and, in the employment context, seeks to correct injustices to ensure that employees within Texas are judged on their merits and performance. But employers who discriminate against LGBTQ employees create significant negative externalities for the state of Texas and her citizens. Indeed, absent protections against discrimination, LGBTQ employees in Texas have faced—and continue to face—the significant economic disadvantages, workplace impacts, and other

pernicious effects of stigmatization and sexual orientation and/or gender-identity discrimination. These, in turn, weaken the Texas economy and increase expenditures for taxpayer-funded public assistance programs in the potential magnitude of hundreds of millions of dollars.

Illustrating the broader implications of LGBTQ stigmatization and discrimination, Justice O'Connor's Equal Protection concurrence in *Lawrence v. Texas* found that the unconstitutional sodomy law was “not just limited to the threat of prosecution or consequence of conviction.” 539 U.S. 558, 581 (2003). Instead, it “brand[ed] all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.” *Id.* Indeed, as the state of Texas itself admitted, the law at the time “‘legally sanction[ed] discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’” *Id.* at 581-82 (quoting *State v. Morales*, 826 S.W. 2d 201, 203 (Tex. App. 1992)) (alteration in original). To Justice O'Connor, the law, which did not apply equally to criminalize or discriminate against opposite-sex sodomy, thus unconstitutionally sought to subject homosexuals to “lifelong penalty and stigma.” *Id.* at 582, 584.

Justice Kennedy even echoed the sentiments of Justice O'Connor's concurrence in *Lawrence*, stating, in *Obergefell*, that discriminatory marriage laws impose “stigma” and “significant material costs” that “harm and humiliate” the children of same-sex couples. 576 U.S. at 668. Indeed, Justice Kennedy's opinion commented that advancing from

“[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.” *Id.* at 667.

Decades of attendant employment discrimination intertwined with the collateral consequences of criminal conviction under anti-LGBTQ laws substantiate Justice O’Connor’s and Justice Kennedy’s concerns. Indeed, the unconstitutional Texas sodomy law and its ilk have had significant impacts on LGBTQ Texans’ ability to pursue and/or maintain employment in various professions, including in what amounts to state-sponsored oppression in certain cases. Employers even engaged in “purging” LGBTQ employees *en masse* and thus not in accordance with the intentions of the TCHRA to judge each employee on his or her individual merits. In the 1940s, the University of Texas Board of Regents investigated and terminated at least ten employees suspected of being homosexual; even the University’s president was terminated because he was purportedly slow to root out a “nest of homosexuals” on the University faculty.⁵

Moreover, in 1990, the Texas Attorney General issued an opinion that conviction of “homosexual conduct”—a Class C misdemeanor—was grounds to automatically bar an applicant or dismiss an employee from working for the Texas State Department of Health, despite the penal code’s explicit statement that conviction of a Class C misdemeanor “does not impose any legal disability or disadvantage.”⁶ In another

⁵ The school also purged fifteen students. *See, e.g., Education: In the Lone Star State*, TIME MAGAZINE, Nov. 27, 1944; *University Row Laid Partly to Homosexuality*, LATIMES, Nov. 18, 1944, at 4.

⁶ Tex. Op. Atty. Gen. JM-1237 (1990).

example, Texas law was used to oppose the candidacy of an openly gay justice of the peace, suggesting that he was unqualified because his lifestyle violated state law.⁷ In still other examples, state laws were used to deny LGBTQ individuals convicted of misdemeanor sodomy violations of licensure as doctors, registered nurses, or even school bus drivers.⁸ The effects of Texas’s historical anti-LGBTQ laws thus have been far-reaching in the employment context and have even been used to prevent LGBTQ individuals from attaining public office.

Even today, such discrimination in employment coupled with stigmatization and discrimination in housing often creates economic instability for LGBTQ individuals and may leave them jobless, homeless, and/or without adequate healthcare. In such situations, these individuals often are left with no other options but to draw on public assistance in the form of homeless shelter expenditures and/or taxpayer-funded Medicaid benefits. For instance, according to the 2015 United States Transgender Survey (“USTS”), 22% of transgender respondents in Texas reported experiencing housing discrimination and 12% reported experiencing homelessness in the prior year.⁹ Transgender homelessness alone in Texas may cost up to \$372,000 annually in shelter

⁷ Amicus Brief of the American Bar Association at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, HOUSTON VOICE, Nov. 8, 2002, at 1).

⁸ Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

⁹ CHRISTY MALLORY ET AL., THE WILLIAMS INSTITUTE, UNIV. CAL., LOS ANGELES SCHOOL OF LAW, THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBTQ PEOPLE IN TEXAS 29-30 (2017).

expenditures alone.¹⁰ And an estimated 6.6% of transgender adults in Texas who lost a job due to anti-transgender bias have enrolled in Medicaid for public assistance health benefits.¹¹ Thus discrimination against transgender individuals creates negative externalities for the economy and people of Texas, including by shifting to the public various costs potentially in excess of \$1.25 million annually for state Medicaid expenditures.¹²

¹⁰ In 2017, the Williams Institute at the University of California, Los Angeles School of Law (the “Williams Institute”), estimated that approximately 177 transgender individuals in Texas stayed in a homeless shelter due to anti-transgender bias. *Id.* at 64, n. 357. Indeed, according to the USTS, nearly one third of transgender individuals in Texas who experienced homelessness avoided staying in a shelter because they feared being mistreated for being transgender. *Id.* at 29-30. The Williams Institute also noted that a 2010 study by the U.S. Department of Housing and Urban Development (“HUD”) estimated that the cost of housing an individual at a shelter for an average length of stay based on cost data from three cities (Des Moines, Iowa; Houston, Texas; and Jacksonville, Florida) is approximately \$2,100. *Id.* at 64. According to the Williams Institute, this is likely a conservative estimate of costs to shelter facilities as the HUD estimate only considers those experiencing homelessness for the first time and individuals only, not families. *Id.* Applying HUD’s estimate to the 177 transgender residents of Texas whom the Williams Institute estimated had to stay at a shelter in the previous year due to housing discrimination on the basis of gender identity, it estimated that this form of housing discrimination may cost Texas up to \$372,000 annually in shelter expenditures. *Id.*

¹¹ *Id.* at 63.

¹² Based on findings from the USTS, the Williams Institute estimated that 6.6% of transgender adults in Texas who lost a job due to anti-transgender bias enrolled in Medicaid. *Id.* at 66 & n. 355. An estimated 2.4% of transgender adults in Texas who had not lost a job due to anti-transgender bias enrolled in Medicaid. *Id.* The Williams Institute attributed the difference in Medicaid enrollment between these two groups (4.2%) to the elevated need for Medicaid coverage resulting from employment discrimination based on gender identity. *Id.* Applying this figure (4.2%) to the population of transgender adults in Texas who have lost a job because of gender identity bias, the Williams Institute estimated that 602 transgender Texans enrolled in Medicaid because of employment discrimination on the basis of gender identity. In 2011, average state spending per Medicaid enrollee in Texas was approximately \$2,082. Therefore, the Williams Institute estimated that employment discrimination experienced by transgender adults on the basis of gender identity costs Texas approximately \$1,253,000 annually in state Medicaid expenditures.

Moreover, stigmatization and the instability attendant to not protecting LGBTQ employees at the statewide level create significant drags on the economy of Texas, in addition to the direct human costs. Both nationally and in the state of Texas, LGBTQ individuals experience significantly higher rates of major depressive disorder (“MDD”) than non-LGBTQ individuals.¹³ MDD has been connected with significant social and monetary costs including loss of productivity in the workplace, absenteeism from work, expenses associated with medical and pharmaceutical services, and even suicide, totaling in the billions of dollars at the national level.¹⁴ If Texas were to extend legal protections to LGBTQ people, including in the workplace, and if social acceptance of LGBTQ individuals increased within the state, Texas likely would see improvements in the physical and mental health of LGBTQ people. A reduction of MDD in LGBTQ individuals by even 25 to 33.3% could likely allow Texas to realize a combination of increased economic benefits and reduced associated costs in the range of approximately \$289.9 to \$385.3 million annually.¹⁵ This is but one example of health disparities for

¹³ The incidence rate was estimated at 18.0% for LGBTQ individuals as compared to 8.1% of non-LGBTQ individuals. *Id.* at 66-67.

¹⁴ *Id.* at 67.

¹⁵ *Id.* Likewise, LGBTQ individuals in Texas experience substance abuse issues at greater rates than non-LGBTQ individuals. For example, the incidence rate for binge drinking was estimated at 25.5% for LGBTQ individuals as compared to 14.3% of non-LGBTQ individuals. *Id.* Binge drinking has also been associated with various social and monetary costs including loss of productivity in the workplace, health care costs, and costs related to the criminal justice system. *Id.* at 68. If Texas were to reduce this higher incidence of binge drinking in LGBTQ individuals by even 25 to 33.3% through similar measures to reduce stigma on and protect LGBTQ individuals, Texas could likely realize a combination of

LGBTQ people in the state, implying that Texas could see *hundreds* of millions of dollars more in savings from reduced health care and social service costs and in increased worker and economic productivity associated with other physical and mental health issues plaguing the Texas LGBTQ community as well.¹⁶

Setting aside the costs imposed on human lives, reducing or eliminating discrimination against transgender people in housing and employment can therefore be a cost-saving measure for the state of Texas, saving at least \$1.6 million annually in Medicaid and shelter expenses alone.¹⁷ Moreover, these are but two examples of cost savings that might accrue to the state when LGBTQ individuals are free from discrimination and employers – and it is in the context of discrimination against only transgender people. The total economic costs in the state of Texas both in direct harms and negative externalities that result from workplace discrimination and LGBTQ disenfranchisement is substantial. These discriminatory practices impede the overall prosperity of Texas and her citizens. For these reasons, this Court should vindicate the purpose of the TCHRA and, in so doing, promote the welfare and prosperity of Texas and her citizens.

increased economic benefits and reduced costs in the range of approximately \$118.3 to \$157.2 million.
Id.

¹⁶ There would likely also be various spillover effects in other areas including in school bullying, juvenile justice, family rejection of LGBTQ youth and teen homelessness, and adoption and foster care, among others, all of which likely would further spur the Texas economy while eliminating or minimizing other attendant costs.

¹⁷ *Id.* at 64.

CONCLUSION AND PRAYER

Employment discrimination is a sinister scourge that both the federal Title VII and the state-law equivalent Texas Commission on Human Rights Act aim to eliminate. Failing to protect workers from overt bias, arbitrary dismissals, and adverse employment decisions clearly undermines the goal of basing employment practices on an individual's merits and performance and instead imposes significant costs on Texas residents and the Texas economy. To give effect to the TCHRA's plain language as well as to vindicate the Texas Legislature's intent and the remedial nature of both laws, this Court should follow the precedent of the Supreme Court of Texas and the holding of the Supreme Court of the United States in *Bostock v. Clayton County, Georgia*. It should conclude that the TCHRA prohibits employment discrimination on the basis of sexual orientation and gender identity.

Amicus HRC therefore requests that this Court allow the plaintiff to amend its complaint to bring an action under the TCHRA. It is just to do so and, in this instance, the just outcome aligns with the command of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 30, 2020, I electronically filed this brief with the Clerk of the Court using the eFile.TXCourts.gov electronic filing system, which will send notification of such filing to counsel of record.

/s/ Patrick S. Opdyke
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